IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.859 OF 2004
ALONG WITH
COMMISSIONER'S REPORT DATED 12/8/2005
ALONG WITH
PRAECIPE FILED BY ADVOCATE MR.DEEPAK SINGH
IN
EXECUTION APPLICATION NO.77 OF 2002

Camoran Finance & Investments,
a Partnership firm, registered
under the Indian Partnership Act,
1932, having their office at
801, Embassy Centre, Nariman Point,
Mumbai - 400 021. ...Claimants

Versus

1.M/s.Viral Enterprises,
a Partnership firm, having their
office at 401, Kshamalaya,
37, New Marine Lines, Mumbai-20
and also at bahar Theatre,
Sahar Road, Vile Parle (East),
Mumbai - 400 057.

2.M/s.Sandip Enterprise,
a Partnership firm, having its
place of business at 216,
Dr.Annie Besant Road, Worli,
Mumbai - 400 018.

3.Manish Estates Pvt.Ltd.,
the partner of Respondent No.1
abovenamed through its Director
Mr.C.D.Shah, having his office at
401, Kshamalaya, New Mrine Lines,
Mumbai - 400 020.

4.M/s.Saral Enterprises,
a Partnership firm, having its
Office at 401, Kshamalaya,
37, New Marine Lilnes,
Mumbai - 400 020 (Chakala Property) ...Defendants

And

M/s.Sudarshan Constructions,
a Partnership firm, registered under
teh Indian Partnership Act, 1932,
having their office at 35, Interlink
Industrial Estate, Caves Road,
Jogeshwari 9E), Mumbai - 400 060. ...Applicants

And

1.Mr.Pradeep Wadhwa,
of Mumbai, Indian Inhabitant,
having his office at 383, Basant
Park, Opp.Police Station, Ground
Floor, Chembur, Mumbai - 400 071.

2.Mr.Deepak Singh, Advocate,
of Mumbai, Indian Inhabitant,
having his office at 6/A, Bonney
Plaza, S.V.Road, Andheri (West),
Mumbai - 400 058.

3.Mr.Vijay Pandey, Advocate,
of Mumbai, Indian Inhabitant,
having his office at High Court,
Mumbai.

4.Commissioner for Taking Accounts,
High Court Annexe Building,
High Court, Mumbai.

5.M/s.Zoom Developers Pvt.Ltd.,
Company incorporated under the
Provisions of the Comapnies Act,
1956, and having its registered office
at 12/2, R.N.T. Marg, Chetak Center,
Indore - 452 001, and having branch
Office at A-53, Road No.1, MIDC
Industrial Area, Marol, Andheri (East),
Mumbai - 400 093.

6.M/s.M.B.Developers,
a partnership firm registered under
Indian Partnership Act, 1923,

having its office at 1st Floor,
M.M.C. Center, Near Vikas Park,
Link Road, Mith Chowky, Malad (W),
Mumbai - 400 064.

7.M/s.Sarathi Finvest Developers Pvt.Ltd.,
a Company incorporated under the
Provisions of the Companies Act, 1956,
and having its registered office at
401A, Natwar Chamber, 94, Nagindas Master
Road, Fort, Mumbai - 400 023 and
having its corporate office at
Dalamal House, 206, J.B.Marg,
Nariman Point, Mumbai - 400 021.

8.Magnificent Construction Pvt.Ltd.,
having their registered office at
12/2, T.N.T. Market, Indore - 452 001
and its corporate office at A-53,
MIDC Road No.1, Andheri (East),
Mumbai - 400 093. ...Respondents

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Mr.Deepak Chitnis for for Applicants.

Mr.G.R.Joshi i/b Ashwin Ankhad for Plaintiffs.

Ms.Deepti Wakhade i/b Thakore Jariwala & Associates for Respondent No.2.

Mr.P.N.Mody i/b Mulla & Mulla & Craigie Blunt & Caroe for Respondents 5 and 8.

Mr.S.D.Mishra for Respondent No.6.

Mr.Kishore Jain for Commissioner for Taking Accounts.

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CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 21, 2005.

ORAL JUDGMENT :

1. This order will dispose of Chamber Summons No.859 of 2004 as well as Commissioner's Report dated 12th August 2004 and praecipe filed on behalf of Mr.Deepak Singh, Advocate dated 29th September 2004. The issues raised in all these three proceedings are overlapping, for which reason, I think it appropriate to dispose of all the proceedings by common order.

2. The relevant facts for deciding the matter in issue are as follows:

. In arbitration proceedings between Claimants and Defendants, consent Award was passed on November 3, 2003. The Claimants took out Execution Application No.77 of 2002 for enforcement of the said consent Award. In the course of Execution proceedings, property situated at CTS No.513, 514, 541 admeasuring 13701.3 square meters equivalent to 16373 square yards situated at Kajuwadi, Sahar Road, Behind Gold Spot Factory, Chakala, Andheri (East), Mumbai - 400 099 was to be sold by public auction in terms of the order passed

by this Court. The Commissioner for Taking Accounts accordingly issued public notice dated 16th December 2003, which was published in the Free Press Journal, Mumbai on December 19, 2003. The notice clearly mentioned that the said property was to be sold along with encroachments thereon and more particularly described in Schedule ‘1’ in the terms and conditions of sale. The notice provided that the intending offerors can have inspection of the said property on 24th December 2003 and 7th January 2004 between 12.00 noon to 4.00 p.m. The offerors were expected to give offers in a sealed cover along with Demand Draft/Bank Pay Order for Rs.10,00,000/- (Rupees Ten Lakhs) in favour of the Commissioner, High Court, Bombay on or before 4.00 p.m. on 14th January 2004. The notice also mentioned that the offer so received will be considered by the Commissioner at his office on 15th January 2004 at 12.00 noon and that the offerors should remain present and raise their offer, if they so desire. It also specified that the said sale was on "as is where is basis" and "as is what is basis". The offers so received were to be then produced before the Judge in Chamber for

the confirmation. The offeror declared as the purchaser was obliged to pay 25% of the purchase price within seven days from the date of the confirmation and the balance purchase price within 30 days of the date of sale. It also provided that in case of default, the deposit amount of Rs.10,00,000/- (Rupees Ten Lakhs) will be forefeited. The terms and conditions of sale were as follows:

> "The particulars and conditions of Sale relating to the immovable property popularly known as "Chakala property" and more particularly described in the Schedule hereto bearing C.T.S. No.513, 514 and 541 admesuring 13,701.3 sq.mt. equivalent to 16373 sq.yards situated at Kajuwadi, Sahar Road, Behind Gold Spot Factory, Chakala, Andheri (E), Mumbai 400 099, along with encroachments thereon, which property is in possession of the Applicants, who are also Mortgagees of the said property and the Decree holders against the Respondents, will be put up for sale by public auction on the 15th January 2004 at 12 noon by the Commissioner, High Court, Bombay at his office on the 3rd floor, P.W.D. Building, Opp. C.T.O., Flora Fountain, Mumbai 400 023 in pursuance of the Order passed in the above Execution Application No.77 of 2001 and hearing date the 7th day of April 2003 and further orders dated 10th November 2003 and 11th December 2003 passed by the Hon'ble Court on Commissioner's Reports dated 6th November

2003 and 8th December 2003.

Detailed particulars of the said immovable property along with the plan are given in the Schedule - 1 hereto.

CONDITIONS OF SALE OF THE PROPERTY DESCRIBED IN THE NOTIFICATION OF SALE ARE:

1. The intending purchaser shall submit his offer in a sealed cover in the office of the Commissioner for Taking Accounts, High Court, Bombay on or before 14th January 2004 before 4.00 p.m. along with D.D./Bank's Pay order of a value of Rs.10,00,000 (Rupees ten lakhs only) issued in favour of the "Commissioner, High Court, Bombay" as a deposit for participating in the said auction.

2. The offers so received will be opened on the day of auction in the presence of the offerors. All the offerors present will be allowed to bid more/higher than the highest bid opened from the sealed envelopes and highest bidder thereafter will be declared as a purchaser. Any person attending the auction, other than the offerors, shall also deposit Rs.10,00,000 (Rupees Ten lakhs only) before bidding in the auction sale.

3. The property shall be put up for sale at a sum to be fixed by the Commissioner at the time of sale. The highest bidder will be the purchaser wand if any dispute arises as to the last or highest bid, the same shall be put up again at the last undisputed bid and resold.

4. No person shall at any bidding offer a less sum than what shall be fixed by the Commissioner or retract a bid.

5. The sale is on "as is where is basis" and "as is what is basis" and the purchaser will have to take care of all

liabilities and encroachments attached to the property. Inspection of documents shall be given to intending purchasers by Claimants' Advocates M/s.Ashwin Ankhad & Associates, 101, Podar Chambers, S.A.Brelvi Road, Near Horniman Circle, Fort, Mumbai 400 001.

6. The Purchaser shall at the time of sale, subscribe his name and address in the bidding paper and all written notices and communications and summons shall be deemed duly delivered to an served upon the Purchaser by being left for him at such address, unless or until he is represented by an Advocate entitled under the rules to act in the suit or matter.

6A. As per the orders of the Hon'ble High Court passed on 29th September 2003 and on 11th December 2003 the Commissioner shall put up the offers received in the auction after the bid is held between the offerors to the Hon'ble High Court for confirmation.

7. The Purchaser shall within 7 days of the Confirmation of sale, deposit 25% of the purchase money with the Commissioner, failing which initial deposit shall be forfeited and the property shall be put up for resale. Any deficiency of price which may arise on a re-sale by reason of the purchaser's default and all costs and expenses occasioned by such re-sale shall be recoverable from the defaulting purchaser under an order to be obtained from the Judge in Chamber.

8. The sale is subject to the confirmation by the Hon'ble Court. As per the order passed by Hon'ble High Court on 11th December 2003, the last offer given at the 3rd Auction held on 5th November 2003, by M/s.Zoom Developers for Rs.3.15 crores is to be kept open.

9. The purchaser shall pay to the Commissioner the balance of the purchase money together with the amount of stamp duty payable on the conveyance to be executed by the office of the Commissioner or on the sale certificate to be issued, within 30 days from the date of the auction or within such further time as may be allowed by the judge in Chambers and if the said amount is not so paid, the deposit may if the Judge thinks fit be forfeited to the Government after defraying the expenses of the sale, and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold. Any deficiency of price which may arise on a re-sale by reason of the purchaser's default and all costs and expenses occasioned by such re-sale shall be recoverable from the defaulting purchaser under an order to be obtained from the judge in Chamber.

10. Upon payment of the full purchase money and the amount of stamp duty in the manner aforesaid and on confirmation of the sale by the Court the purchaser shall be entitled to possession of the property from the Applicants who are in possession of the property and to the rents and profits of such parts as are let as from the date of such payment, and shall be entitled to a proper conveyance from the Commissioner. Such conveyance shall be prepared by and at the expense of the purchaser, such expenses to include the stamp duty, registration fee. The Commissioner in turn will also pay to the Applicants M/s.Camoron Finance & Investments a sum of upto Rs.5.15 crores out of the sale proceeds received under clauses (7) and (9) above, as per the order dated 7th April 2003 passed by this Hon'ble Court in Judges Order No.77 of 2003. Out of the said sum of Rs.5.15

crores, which comprises of Rs.4.99 crores towards balance principal amount under the award and a sum of Rs.14.48 lakhs towards expenses of sale of Bahar property, the Commissioner has verified the expenses of sale at Rs.14.48 lakhs as per the order dated 28th April 2003 passed by the Hon'ble High Court of Bombay.

11. In the event of the conveyance to the purchaser not being executed within thirty days from the date of the confirmation of the sale, it shall not be lawful for the purchaser at the expiration of such thirty days to object, on the ground of his not having received his conveyance or otherwise, to such distribution or payment of the purchaser money by the Commissioner to the Applicants.

12. The Purchaser shall not be liable to pay the outgoings previous to day of payment of the purchase money and the rents and outgoings shall be apportioned, if necessary. The Purchaser shall at his own expenses take such steps as may be necessary for the purpose of obtaining possession.

13. The production and inspection of all deeds, evidence and muniments of title which are not in possession of power of the party having the conduct of the proceedings and the procuring and making of all certified, attested or other copies of extracts or from any registers, deeds, wills or other documents, and of all declarations or other evidences as to identify, whether required fro the verification of the abstract or for any other purpose shall be at the expenses of the purchaser requiring the same.

14. If any error or mis-statement shall appear to have been made in the particulars of description of the property, such error or mis-statement (if

> capable of compensation) shall not annul the sale nor entitle the purchaser to be discharged from his purchase, but a compensation shall be made to or by the Purchaser, as the case may be and the amount of such compensation shall be settled by the Commissioner.
>
> 15. A list of documents pertaining to the property including Title Deeds, mortgages etc. is given in Schedule-2."

3. In continuation of the public notice published on 19th December 2003, further notice of sale was issued referring to the previous notice dated 19th December 2003 with clarification that the offerors should give their offers in sealed cover so as to reach the Commissioner on or before 15th December 2004. Pursuant to the above advertisement, offers were received in the Office of the Commissioner. One such offer received in sealed cover was from Sudarshan Constructions, Applicants in Chamber Summons No.859 of 2004, who offered Rs.4.11 crores for the property and also enclosed pay order of Rs.10,00,000/- (Rupees Ten Lakhs). This offer is sent on the letter head of Sudarshan Constructions dated 14th January 2004 and is signed by one Vaishali for and on behalf of A.S.Nagpal and others. The letter clearly states

that inspection of the subject property has been taken and the offer of Rs.4.11 crores to purchase the said property was given, accompanied by the demand draft of Rs.10,00,000/- (Rupees Ten lakhs) dated 15th January 2004 drawn on Bank of Baroda towards initial deposit. This offer in sealed cover on behalf of Sudarshan Constructions was presented by one Mr.Pradeep Wadhwa before the Commissioner, claiming to be partner of Sudarshan Constructions. As per the notice, competitive bidding was to take place on 15th January 2004. At the said bidding, Mr.Pradeep Wadhwa was present and participated in the bidding on behalf of Sudarshan Constructions. The bidding was mainly between Sudarshan Constructions and M.B.Developers. Representative of M.B.Developers gave offer with regard to the subject property, up to Rs.5.48 crores, whereas, Mr.Pradeep Wadhwa, representative of Sudarshan Constructions raised that offer up to Rs.5.51 crores. As that was the highest offer received, the Commissioner submitted report before the Court, which came up for consideration on 20th January 2004. The Court after considering the relevant aspects, passed the following order:

"Perused the report submitted by the Commissioner dated 15th January 2004. The highest bid has been received from M/s.Sudarshan Construction in the amount of Rs.5 crores 51 lakhs, the same is in excess of the fair market price in respect of the subject property indicated in the second valuation report.

Mr.Pradeep Wadhwa, claiming to be partner of Messrs.Sudarshan Construction is personally present in Court and agrees to abide by the usual terms and conditions.

Accordingly, sale in favour of Messrs.Sudarshan Construction is confirmed on usual terms and conditions. Appropriate steps be taken in that behalf.

My attention has been drawn to a letter sent by M.B. Developers, unsuccessful bidder, dated January 16, 2004. Request is made for refund of earnest money deposited by the said party. However, direction on that request is deferred for a period of 10 days from today.

Mr.Shah appears for Zoom Developers and states that his client has no objection to keep the offer given by him valid for a period of three weeks from today, on the same terms, but submits that the said party would increase its offer upto 4 crores. That aspect will be considered as and when the occasion arises.

The amount as deposited on behalf of Zoom Developers, which has been invested, be continued for a period of three weeks from today.

Place this report for further directions along with information regarding developments on 28th January 2004 at 2.45 p.m."

4. The matter then appeared on 28th January 2004, when Advocate Mr.Vijay Pandey appeared on instructions of Pradeep Wadhwa, representative of Sudarshan Constructions and informed the Court that due to unavoidable circumstances, the amount could not be deposited. The Court recorded the assurance given on behalf of Pradeep Wadhwa. The matter appeared on 28th January 2004 when the Court passed the following order :

> "1. Mr.Pandey has appeared on instructions of Mr.Pradeep Wadhwa, representative of Sudarshan Constructions, and states that due to unavoidable circumstances, the amount could not be deposited as was required to be done in terms of order dated 20th January 2004. however, assurance is given that M/s.Sudarshan Construction will deposit sum of Rs.50 lakhs in this Court on or before Wednesday 4th February 2004. In so far as the balance amount in terms of the order dated 20th January 2004 is concerned, assurance is given that the same will be deposited within one week therefrom. The above assurance is accepted by way of indulgence as last opportunity.
>
> 2. In the circumstances, post this matter on 5th February 2004 for further directions."

5. In terms of order dated 20th January 2004, the Commissioner's report dated 27th January 2004 was listed on 5th February 2004 for consideration, on which following order came to be passed :

> "1. On the previous occasion, assurance was given by Mr.Pandey on instructions of Mr.Pradeep Wadhwa, representative of M/s.Sudarshan Constructions that necessary amounts will be deposited in this Court on or before 4th February 2004, however, no such deposit has been made. Today when the matter is called out, learned Counsel seeks to rely on the order passed by the Division Bench of this Court dated 31st July 2002 in Writ Petition No.1152 of 2002. I am at a loss to understand the relevance of this proceedings with the issue that is involved in the present case.
>
> 2. According to the learned Counsel, the notice for sale issued is vague. That is no argument available to M/s.Sudarshan Constructions, who participated in the sale and had given highest bid. This only shows that they are more interested in prolonging the proceedings than concluding the transaction by depositing the balance amount. In such a situation, the only course open to this Court is to invoke Clause 7 of the Terms and Conditions of Sale of the property in question. Ordered accordingly.
>
> 3. Reserve price in respect of the suit property was fixed by this Court. However, it was brought to the notice of the Court on subsequent occasion that the specifications given earlier were incorrect, on account of which, this Court

invited fresh valuation report. In terms of that direction, second valuation report has been received dated December 5, 2003 from M/s.Parelkar and Dallas. M/s.Zoom Developers Private Limited had initially made an offer of Rs.3.15 crores (Rupees Three Crores & Fifteen Lakhs), but has raised that offer up to 3.5 crores (Rupees Three Crores Fifty Lakhs) and has made firm commitment to conclude the transaction through their Counsel. The offer made by M/s.Zoom Developers Private Limited is the highest offer in respect of the property and it is seen that the same is well in excess of the fair market price determined by the valuers in the second report. In the circumstances, I think it appropriate to director the Commissioner to take such necessary steps to conclude the sale of the suit property in favour of M/s.Zoom Developers Private Limited for an agreed price of Rs.3.5 crores (Rupees Three Crores and Fifty Lakhs) on usual terms and conditions, as I am hereby confirming the sale in its favour. Steps in that behalf be taken forthwith. Deposit already made along with the interest accrued thereon, if any, on behalf of M/s.Zoom Developers Private Limited be adjusted towards the consideration amount.

4. Mr.Denzil D'Mello for the Judgment Debtor submits that Court should make one more effort to invite fresh offers in respect of the property in question. I see no reason to accept this suggestion, for it is more than evident that on five occasions, such attempt has been made in the past and no fruitful purpose would be served by inviting fresh offer, moreover the offer given by M/s.Zoom Developers Private Limited is far in excess of the fair market price indicated in the second valuation report. Hence, that request is rejected.

> 5. Counsel for M/s.Sudarshan Constructions made an attempt to suggest that he would increase the offer to Rs.3.75 crores (Rupees Three Crores & Seventy-five Lakhs) in respect of the suit property. however, in the earlier part of this order, I have already directed invocation of Clause 7 of the Terms and Conditions of Sale qua the said party, in view of the default committed by them inspite of ample opportunity given to deposit the balance amount in the past. Hence, I see no reason to entertain the offer made on behalf of M/s.Sudarshan Constructions, as in my opinion, it is only one more attempt on its part to prolong the proceedings.
>
> 6. The Commissioner is directed to initiate proceedings for recovery of the amount from M/s.Sudarshan Constructions in view of the invocation of Clause 7 of the Terms and Conditions of Sale.
>
> 7. It needs to be placed on record that other offerers M/s.M.B.Developers as well as of Sarti Finwest and Developers Private Limited have withdrawn their offer. Commissioner to take steps to refund the earnest money deposited by them as per rules.
>
> 8. Ordered accordingly."

6. It appears that against the order dated 5th February 2004, the Judgment Debtor carried the matter in appeal before the Division Bench and contended that the Court should have called for another auction. The said Appeal was, however, dismissed on 15th February 2004, which order reads

thus :

> "1. Heard the counsel for the parties.
>
> 2. This appeal seeks to challenge the order passed by a Single Judge confirming the sale of the concerned property at Rs.3.5 crores in favour of Respondent No.7 - Zoom Developers. Mr.Divan for the Appellants submitted that on an earlier point of time, a larger offer was made by the concerned party. However, the fact remains that ultimately the party has confined its offer to Rs.3.5 crores. We cannot insist that the party should give a higher offer. In fact, Mr.Madon for Respondent No.4 has submitted that for any reason the Appellants want to delay the confirmation of the sale, Respondent No.7 would like to withdraw from the offer which is now made.
>
> 3. Mr.Joshi for Respondent No.1 - judgment creditor submits that the Award has been made way back in November 2001 and five attempts have been made so far for the sale of this very property. This being so, although Mr.Divan is saying that the confirmation may be adjourned further for better price, in our view, no purpose will be served thereby. No other submission is canvassed. Appeal is dismissed."

7. In the meantime, however, in view of the orders passed on 20th January 2004, 28th January 2004 and 5th February 2004, the Commissioner for Taking Accounts sent communication dated 10th February 2004 to Mr.Deepak Singh, Advocate who

purportedly appeared before the Court on behalf of Sudarshan Constructions on 28th January 2004 and copy of the said letter was also forwarded to Sudarshan Constructions. The same reads thus :

> "Your client is hereby called upon through you to deposit as directed by Order dated 5th February, 2004, a sum of Rs.2,01,00,000/- (Rupees Two Crores and 1 lakhs only) being the deficiency of purchase price in a sum of Rs.3,50,00,000/- (Rupees Three Crores fifty lakhs only) given by M/s.Zoom Developers and which has been confirmed by the Hon'ble Court in their favour pursuant to the Order dated 5th February, 2004 passed by His Lordship Justice Khanwilkar. The aforesaid amount of Rs.2,01,00,000/- (Rupees Two Crores one lakhs only) be deposited forthwith as you failed and neglected to deposit a sum of Rs.50 lakhs pursuant to the Order dated 28th January, 2004 by 4th February, 2004 though you have given assurance to the hon'ble Court to do so.
>
> Further you are well aware about the order passed by His Lordship Justice Khanwilkar on 20th January, 2004 by which the Offer given by your client in the sum of Rs.5,51,00,000/- (Rupees Five Crores fifty one lakhs only) was confirmed by the Hon'ble Court.
>
> If the aforesaid amount of Rs.2,01,00,000/- (Rupees Two Crores and one lakh only) is not deposited forthwith the appropriate proceedings will be taken against you by submitting reports to the Hon'ble Court.

> You are well aware of the Orders passed by the Hon'ble Court on 20-1-2004, 28.1.2004 and 5.2.2004 when you were present alongwith your counsel Shri Vijay Pandey and Mr.Pradeep Wadhwa, representative of your client at the time of hearing and passing the aforesaid Orders.
>
> You are further informed that the earnest money in the sum of Rs.10,00,000/- (Rupees Ten Lakhs) only deposited by your client is stand forfeited as per clause 7 of terms and conditions of sale as ordered by the Hon'ble Court by its Order dated 5th February, 2004, which please note."

8. In response, Sudarshan Constructions have sent letter to the Commissioner for Taking Accounts dated 23rd February 2004, which reads thus :

> "We have applied our application in auction sale of VIRAL ENTERPRISES & OTHERS, on 14th January 2004, along withy pay order of Rs.10,00,000/- (Rupees Ten Lakhs Only), our offer for purchase the above sale property in Rs.4,11,00,000/- (Rupees Four Crores Eleven Lakhs Only) on the name of A.S. Nagpal & Others.
>
> We have given the Bid in closed envelope to court, & handed over to Mr.Pradip Wadhwa just to deliver it to the court, our intention was to Purchase the said property in Rs.4.11 Cr. Only, we had told to Mr.Pradip Wadhva that in the court is any body goes ahead for more than Rs.4.11 Cr. Than, Please take our pay order back and closed the deal but the broker Mr.Pradip Wadhwa has made his own afford

to purchase the said property without our permission and without any authorisation and consideration.

He is only a broker, he do not have any knowledge as well as he is not our legal representative on behalf of us.

Unfortunately he Bid on his own accord without our knowledge, without our instruction, without our authorisation he himself has puts in trouble without any cause.

Therefore we hereby request your honour to give us a justice for the same difficult situation. Now court have allotted the property to zoom developer and order have been passed in their favour.

Therefore we request you sir to either refund our pay order of Rs.10 lakhs or we assures that if court issue a order in our favour for sale the property in our quoted price of Rs.4.11 Cr., we are ready to accept to same without any delay.

So we hereby humbly request you honour to please refund our pay order to us and oblige."

. This letter is sent under the signature of Mr.A.S.Nagpal & Others. The Commissioner, in turn, informed Sudarshan Constructions by letter dated 26th February 2004 that the High Court has already passed order on 5th February 2004 on the subject, for which reason, it is not possible to consider the request made in their letter dated 23rd

February 2004. The Commissioner also informed that if so advised, Sudarshan Constructions can move the High Court for appropriate orders. The Commissioner took up the matter with the Judgment Creditors as to whether they were willing to pursue the proceedings against Sudarshan Constructions. In response thereto, however, the Judgment Creditors informed the Commissioner by letter dated 26th February 2004 that they were not interested in initiating any proceedings against Sudarshan Constructions and that the Commissioner may do so, if so advised and deduct expenses from the auction proceeds. Similar request was made by the Commissioner to the Respondents/Judgment Debtors in response to which, the Advocate for the Judgment Debtors by letter dated 24th March 2004 informed the Commissioner that it was not possible for him to represent the Commissioner in proceedings for recovery of the amounts from Sudarshan Constructions. However, on 29th June 2004 took out Chamber Summons No.859 of 2004 for the following reliefs:

(a)(i) that it be declared that the auction sale dated 15th January, 2004 held of the suit property viz. plot of land bearing CTS No.513, 514, 541 and bearing Survey No.18m, Hissa No.5, Survey no.35, Hissa No.2, Survey No.111, Hissa No.1, admeasuring in all 13701.3 sq.mtrs. thereabout, situate at Kajuwadi, Sahar Road, behind Gold Spot Factory, Chakala, Andheri (E), Mumbai and referred as Chakala property is not binding on the Applicants abovenamed and/or their partners and the same be declared as illegal, bad in law and void ab-initio against the Applicants abovenamed;

(a)(ii) that the orders dated 20th January, 2004 and 28th January, 2004 passed by His Lordship Mr.Justice A.M.Khanwilkar in Execution Application No.77 of 2002 along with award dated 31st November, 2001 be set aside;

(b) that the order dated 5th February, 2004, ordering/directing Respondent No.4 to initiate proceeding against the Applicants for recovery of amounts from the Applicants passed by His Lordship Mr.Justice A.M.Khanwilkar on report submitted by Respondent No.4 be set aside;

(c) that the notice issued by the Respondent No.4 dated 10th February, 2004 bearing No.88 of 2004 addressed to Respondent no.2 and applicants in pursuance of the Order dated 5th February, 2004 be declared as illegal, bad in law, void ab-initio and not binding on the Applicants abovenamed;

(d) that the Respondent No.4 be restrained by an order and injunction of this Hon’ble Court from taking any steps, action, and/or execution proceedings to implement the said auction sale dated 15th January, 2004 and the letter dated 10th February, 2004 bearing No.88 of 2004 issued by the

Respondent No.4 to he Applicants abovenamed relating to the sale of the said Chakala property;

(e) that pending the hearing and final disposal of the above Chamber Summons, the Respondent No.4 be restrained by an order and injunction of this Hon'ble Court from taking any steps, action and/or execution proceedings to implement the said auction sale dated 15th January 2004 and the Letter dated 10th Feb., 2004 bearing No.88 of 2004 issued by the Respondent No.4 to the Applicants abovenamed relating the sale of said Chakala property;

(f) that pending the hearing and final disposal of the above Chamber Summons, the Respondent No.4 be restrained by an order and injunction of this Hon'ble Court from taking any steps action and executing the orders dated 5th February, 2004 passed by this Hon'ble Court in pursuance of the auction sale dated 15th January, 2004 for recovering the amount of Rs.2,01,00,000/- from the Applicants as mentioned in letter dated 10th February, 2004 sent by Respondent No.4 to the Applicants abovenamed;

(g) ad-interim reliefs in terms of prayers (a) to (f) above;

(h) for costs of this Chamber Summons be provided for;

(i) for such further and other reliefs as the nature and circumstances of the case may require be granted."

9. The Chamber Summons was filed appended by affidavit-in-support of Amrik Singh Nagpal, stating

to be authorised representative of the Applicants. Suffice it to observe that no authority letter was filed along with the Chamber Summons nor produced before the Office authorising Mr.Amrik Singh Nagpal to take out the Chamber Summons on behalf of M/s.Sudarshan Constructions, which is stated to be a registered partnership firm. It is not in dispute that Mr.Amrik Singh Nagpal is not a partner of the said partnership firm. Insofar as the plea taken in the Chamber Summons on behalf of Sudarshan Constructions, that will be adverted to at the appropriate stage.

10. Be that as it may, the Commissioner for Taking Accounts filed report dated 12th August 2004 for the following reliefs :

> "(a) that the Answering Respondents be, jointly and severally ordered and directed to pay to the Commissioner for taking Accounts, High Court, Bombay, the said deficit amount of Rs.2,01,00,000/- within a period of two weeks or within such period as may be deemed fit, proper and reasonable by this Hon'ble Court;
>
> (b) That in the event of failure of default on the part of the Answering

Respondents to pay to the Commissioner for Taking Accounts, High Court, bombay, the amount of Rs.2,01,00,000/- (Rupees Two Crores one lakh only), the Commissioner for Taking Accounts, within the time as may be prescribed by Hon'ble Court be permitted to attach and thereafter sale by public auction or private treaty, assets and properties of the Answering Respondents, all to the extent of the said deficit amount of Rs.2,01,00,000/- (Rupees Two Crores one lakh only);

(c) In the event of reliefs sought for vide prayer (b) above being granted, the Commissioner for Taking Accounts, High Court, Bombay be permitted to take physical possession of such of the assets of the Answering Respondents as may be necessary with the help of police for the purpose of effecting sale thereof by public auction or private treaty on what is known as "as is where is" basis;

(d) pending the hearing and final disposal of above report, the Answering Respondents be directed to disclose on oath within a period of one week or within such period as this Hon'ble Court may prescribe, their assets and properties, moveable as well as immovables;

(e) pending the hearing and final disposal of the above report, this Hon'ble Court be pleased to restrain the Answering Respondents from in any manner selling, disposing off, creating third party rights and/or charge in or upon and/or inducting any third party therein and/or parting with possession of upon any of their assets and properties;

(f) for ad-interim reliefs in terms of prayer (d) and (e) above;

(g) for cost, of this report and costs incidental consequential thereto be provided for;

(h) for such other and further reliefs as the nature and circumstances of the case may require and/or this Hon'ble Court may deem fit and proper."

11. While the aforesaid proceedings were pending, praecipe came to be filed by M/s.Thakore Jariwala and Associates (registered Advocates and Solicitors) dated 20th September 2004 mentioning the circumstances to explain how the appearance of Mr.Deepak Singh has been wrongly recorded in the order dated 28th January 2004. By this praecipe, it is prayed that the appearance of Mr.Deepak Singh be deleted from the proceedings dated 28th January 2004.

12. As the issues involved in all the three proceedings were overlapping, it was thought appropriate to hear and decide all the three proceedings by common order.

13. It may be mentioned that pleadings have been filed on behalf of the respective parties by

way of affidavit explaining their respective position. I may further add that during the course of arguments, Counsel appearing for the parties had agreed that instead of multiplying the proceedings, as the stand of the respective parties was already on record by way of affidavit in one or more of the proceedings out of the three proceedings, the Affidavit so filed be considered as having been filed in all the proceedings to decide the point in issue. On that understanding, the Court did not insist for filing separate affidavits in the respective proceedings. This aspect is highlighted as one of the argument of the Applicants Sudarshan Constructions, while giving reply to the argument canvassed on behalf of the opposite parties to the stand taken by Sudarshan Constructions, it was contended that the averments made in the affidavit-in-support of the Chamber Summons taken out by Sudarshan Constructions have not been specifically denied. This submission is clearly departing from the earlier position accepted by the parties that separate affidavits in each of the proceedings may not be necessary as the stand of the respective parties on affidavit was already on

record.

14. It may be mentioned that in the Chamber Summons filed by Sudarshan Constructions, originally one Mr.Pradeep Wadhwa, Mr.Deepak Singh, Advocate, Mr.Vijay Pandey, Advocate and Commissioner for Taking Accounts were made Respondents. However, as the hearing progressed, Sudarshan Constructions have amended the Application by impleading Zoom Developers Pvt.Ltd., M/s. M.B. Developers, M/s.Sarathi Finvest Developers Pvt.Ltd. and Magnificent Constructions Pvt.Ltd. as Respondents. M/s.Zoom Developers, M/s.M.B.Developers and M/s.Sarathi Finvest Developers Pvt.Ltd. have been impleaded as Respondents, as they had participated in the bids given to the Commissioner in respect of the subject property. Eventually, the sale was confirmed in favour of Zoom Developers being the highest bidder. M/s.Magnificent Constructions Pvt.Ltd. have been impleaded as Respondents, as it came on record in the affidavit filed on behalf of M/s.Zoom Developers Pvt.Ltd. that after the sale was confirmed in favour of Zoom Developers, they have

transferred the property by registered conveyance in favour of M/s.Magnificent Constructions Pvt.Ltd., who in turn, have later on mortgaged the property to their bankers for raising of funds.

15. Having considered the pleadings on record and the oral arguments canvassed on behalf of the respective parties, the first question that needs to be addressed is: whether in the fact situation of the present case, it is open for this Court to set-aside the sale confirmed in favour of M/s.Zoom Developers Pvt.Ltd. under order dated 5th February 2004 in the sum of Rs.3.5 crores? The answer to this question will have to be in the negative. This is so because in the first place, I find force in the submissions canvassed on behalf of Zoom Developers as well as Judgment Creditors that although the Chamber Summons taken out by Sudarshan Constructions challenges the order dated 5th February 2004, however, the challenge is limited to the liability fastened on Sudarshan Constructions under the said order for recovery of deficit amount on account of confirming sale in favour of M/s.Zoom Developers Pvt.Ltd. in the sum of Rs.3.5 crores

only, instead of the offer given by Sudarshan Constructions, which was accepted by the Court in the sum of Rs.5.51 crores.

16. I also find substance in the argument canvassed on behalf of Zoom Developers and M.B.Developers that no allegations have been made in any of the pleadings filed on behalf of Sudarshan Constructions against either of them nor any specific relief is claimed against them in the Chamber Summons. Whereas, the substance of the challenge of Sudarshan Constructions is to the order dated 20th January 2004 confirming sale in their favour as not binding on them for the reasons which will be considered separately. Understood thus, the question of setting aside sale confirmed in favour of M/s.Zoom Developers Pvt.Ltd. will not arise.

17. Besides, I find substance in the argument canvassed on behalf of Zoom Developers as well as Magnificent Construction Pvt.Ltd. and the Judgment Creditors that much water has flown since the

confirmation of sale in favour of M/s.Zoom Developers Pvt.Ltd. on 5th February 2004 and it has become an irreversible process. This is so, because Zoom Developers after confirmation of sale in its favour conveyed the property in favour of Magnificent Constructions Pvt.Ltd. by a registered conveyance. Indeed, said Magnificent Constructions Pvt.Ltd. is a sister concern of Zoom Developers. None the less, is a separate entity. Further more, the said M/s.Magnificent Constructions Pvt.Ltd., in turn, have mortgaged the property to its bankers for raising of funds and the funds so raised have been invested by the said Company in their projects. Similarly, the sale proceeds which were recovered from the Zoom Developers after confirmation of sale in their favour have been adjusted and withdrawn by the Judgment creditors. That amount in turn, has been invested by the Judgment Creditors in their business activities and if the sale was to be set aside, it would be impossible for these parties to reverse all those transactions. Even on this count, it will not be appropriate to consider the attempt made on behalf of the Applicants to overturn the sale in favour of

Zoom Developers which was confirmed under order dated 5th February 2004.

18. There is yet another reason why the prayer for setting aside sale confirmed in favour of Zoom Developers under order dated 5th February 2004 cannot be considered. The limitation for setting aside sale provided by Article 107 of the Limitation Act is 60 days from the date of sale. The limitation period of 60 days from the date of sale was over in April 2004. Taking any view of the matter, it is not possible to consider the argument of setting aside the sale of the said property confirmed in favour of M/s.Zoom Developers Pvt.Ltd. under order dated 5th February 2004.

19. The principal question that needs to be addressed in the present proceedings is: whether Sudarshan Constructions are liable for the deficiency in sale proceeds on account of confirmation of sale in favour of M/s.Zoom Developers Pvt.Ltd. in the sum of Rs.3.5 crores instead of the offer given by Sudarshan Constructions during the bidding which came to be

accepted by the Court being the highest offer in the sum of Rs.5.51 cores. On the other hand, if the stand of Sudarshan Constructions was to be accepted that the offer given on their behalf by Mr.Pradeep Wadhwa is without authority or in excess of authority and therefore, not binding on them, in that case, the Court will have to issue directions for refund of the initial deposit amount of Rs.10,00,000/- (Rupees Ten Lakhs) made on behalf of Sudarshan Constructions.

20. The case of Sudarshan Constructions, in substance, is three-fold. In the first place, it is argued that Mr.Pradeep Wadhwa had no authority to offer bid either before the Commissioner for Taking Accounts or the Court on their behalf. Secondly, that no Vakalatnama has been given on behalf of Sudarshan Constructions and as such offer made on behalf of Sudarshan Constructions either before the Commissioner or the Court will not bind them. It is lastly submitted that in law, Sudarshan Constructions is not liable because it is not a case of resale in favour of M/s.Zoom Developers Pvt.Ltd. within the meaning of Order

XXI Rule 71 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'Code'). It is only in cases where the deficiency is on account of resale held under the provisions of Order XXI Rule 71 of the Code that the liability of Sudarshan Constructions for the deficiency of price can be reckoned and not otherwise.

21. I shall deal with the last submission first. This is so because if Sudarshan Constructions is right on this submission, it will not be necessary to examine other issues on the point of authority given or possessed by any other person to make offer on behalf of Sudarshan Constructions so as to bind the said firm on that account. The argument that it is not a case of resale, was pressed into service relying on the order passed by this Court on 11th December 2003 as well as dated 5th February 2004. It is submitted that neither order dated 11th December 2003 requires resale of the property within the meaning of Order XXI Rule 71 of the Code nor the order dated 5th February 2004 is in the nature of

ordering resale within the meaning of said provision. If it is so, in view of the legal position expounded by the Apex Court in the case of **Gopal Krishan Das vs. Shailendra Nath Biswas & Anr. reported in AIR 1975 SC 1290**, it will have to be held that Sudarshan Constructions cannot be made liable for the deficiency of price even though the same has occurred on account of default in depositing the amount by Sudarshan Constructions. The argument seems to be attractive but is without any substance. Indeed, the legal principle expounded in the decision of **Gopal Krishan Das (supra)** takes the view that provisions of Order XXI Rule 71 of the Code would become applicable limited to cases of resale in which the deficiency of price has occurred by reason of auction purchaser's default. It is also held that the resale of property, in default of payment of the purchase-money, can be made only after the issue of fresh proclamation as provided under Order XXI Rule 87 of the Code. Relying on this exposition, it was contended that in the present case, no fresh proclamation was issued, for which reason, it is not a case of resale and therefore, even if it is a

case of deficiency of price, cannot be recovered by invoking provisions of Order XXI Rule 71 of the Code. The fallacy in this argument is on account of misconstruction of the orders passed by this Court dated 11th December 2003 and 5th February 2004. The order dated 11th December 2003 passed by this Court, in my opinion, has no relevance for deciding the point in issue. It is on the basis of that order, that public notice or proclamation was issued for sale of the property which was published on 19th December 2003. The sale was conducted on the basis of said proclamation and offers were received by the Commissioner for Taking Accounts which were considered on 15th January 2004. The Commissioner placed the report for confirmation of sale in favour of Sudarshan Constructions being the highest bidder in the sum of Rs.5.51 crores before the Court on 20th January 2004. The Court confirmed the sale in favour of Sudarshan Constructions on 20th January 2004. Sudarshan Constructions, however, failed to comply with the obligation under the terms and conditions of sale inspite of opportunity given in that behalf. When the matter came up for consideration on 5th

February 2004, the reading of that order, in my opinion, is that it not only set-aside the sale in favour of Sudarshan Constructions for the reasons recorded therein but also directed the Commissioner to take consequential steps against Sudarshan Constructions; and on the same date, this Court proceeded to conduct "resale" of the subject property and confirmed the sale in favour of M/s.Zoom Developers Pvt.Ltd.

22. The question is: whether it was necessary for this Court to direct issuance of fresh proclamation for resale? Going by the provisions of Rule 87 read with Rule 71 of Order XXI of the Code, it may give an impression that such a course was necessary. However, I find substance in the argument canvassed on behalf of the Judgment Creditors that in view of Rule 542 of the Bombay High Court (Original Side) Rules, 1980, it was open to this Court to dispense with the requirement for fresh proclamation. Rule 542 reads thus :

"542. Proceedings on a resale

> When a re-sale is directed, unless otherwise ordered, a fresh notification shall be issued and published and the proceedings down to the certificate of sale shall be similar to those on an original sale."

. On plain reading of this Rule, it is obvious that in a case of resale, the discretion of issuing fresh notification is left to this Court as it provides that "unless otherwise ordered". The order dated 5th February 2004 clearly records that it was not necessary to issue fresh notification as can be discerned from para 4 of the order, where such request was made on behalf of the Judgment Debtor and rejected. It is not in dispute that this issue was specifically raised on behalf of Judgment Debtor in the appeal preferred before the Division Bench which was also negatived. In that sense, the issue as to whether fresh notification was necessary, has been concluded by the decision of the Division Bench dated 15th February 2004. In other words, fresh proclamation or fresh notification was not required to be issued, as this Court exercised discretion in terms of Rule 542 as can be discerned from the order dated 5th February

2004. Non-issuing of fresh proclamation or fresh notification, therefore, would not absolve Sudarshan Constructions of their liability under Order XXI Rule 71 of the Code regarding the deficiency of price. The decision of the Apex Court is, therefore, inapplicable to the fact situation of the present case, which is governed by the Bombay High Court (Original Side) Rules.

23. Accordingly, the next question that arises for consideration is: whether the offer given by Mr.Pradeep Wadhwa before the Commissioner for Taking Accounts and this Court on behalf of Sudarshan Constructions will be binding on Sudarshan Constructions. According to Sudarshan Constructions, Mr.Pradeep Wadhwa had no authority to bid either before the Commissioner or before this Court. Whereas, said Mr.Pradeep Wadhwa gave offer on behalf of Sudarshan Constructions representing himself to be partner of the said firm. As he had no authority and was neither a partner nor employee of Sudarshan Constructions, offer given by him will not bind Sudarshan Constructions. The incidental question that may

arise for consideration is, assuming that Mr.Pradeep Wadhwa had authority to submit the written offer made on behalf of Sudarshan Constructions to the Commissioner for Taking Accounts, whether he exceeded authority in raising the offer before the Commissioner as well as this Court on behalf of Sudarshan Constructions, for which reason, such act cannot bind Sudarshan Constructions to make good deficiency price. These questions can be answered by adverting to the stand taken on behalf of the respective parties in affidavits filed before this Court. The affidavit in support of the Chamber Summons taken out on behalf of Sudarshan Constructions is filed by one Amrik Singh Nagpal claiming to be the authorised representative. It is seen from the record that no authorisation letter was produced when the Chamber Summons was presented for filing. When objection was raised on behalf of Commissioner, during course of arguments, authorisation in favour of Amrik Singh Nagpal signed by Harmohan Singh, one of the partner of the said partnership firm dated 2nd January 2004 was produced across the bar. The same reads thus :

"TO WHOMSOEVER IT MAY CONCERN

We hereby grant absolute authority and complete power to Mr.Amriksingh Nagpal, by appointing our representative to take part in auction sale of the plot of land known as Chakala Property, situated at Kajuwadi, Sahar Road, Behind Goldspot Factory, Chakala, Andheri (East), Mumbai, for purchasing the said property, belonging to M/s.Viral Enterprises and other for a total consideration of Rs.4,11,00,000/- (Rupees four Crores Eleven Lacs only). We hereby authorized, Mr.Amriksingh Nagpal to sign necessary documents, on behalf of our firm and to enter correspondence with the Commissioner fro Taking Account and for purchase of completing the transaction of purchase of the said property, as also for taking part in purchase of the said property for Commissioner for Taking Account, High Court, Mumbai, all acts, matters and deeds which will be undertaken by Mr.Amriksingh Nagpal will be binding on us relating to the said property.

DATED THIS 02ND DAY OF JAN.2004

Yours Faithfully,
For M/s.SUDARSHAN CONSTRUCTION

Sd/-
HARMOHAN SINGH (PARTNER)

I accept the aforesaid appointment of
Authorized representative of
M/s.Sudarshan Construction

Sd/-
(AMRIKSINGH NAGPAL)"

. No reference is made to this authorisation

given to Amrik Singh in the communication sent to the Commissioner for Taking Accounts before institution of the Chamber Summons or in the pleadings filed before this Court. In other words, this document is afterthought only after objection was raised regarding authority of Amrik Singh during the arguments. Later on, affidavit of Harmohan Singh Nagpal came to be filed ratifying the stand taken in the affidavit of Amrik Singh Nagpal dated 10th June 2004.

24. Be that as it may, the substance of the stand taken in the affidavits filed on behalf of Sudarshan Constructions regarding the factum of authority of Mr.Pradeep Wadhwa is concerned, the same is that Pradeep Wadhwa contacted Amrik Singh and Harmohan Singh. Harmohan Singh agreed to purchase the property for Rs.4.11 crores and gave authority in favour of Amrik Singh for that purpose. Amrik Singh claims to have signed the offer letter in consultation with Harmohan Singh. However, as is found from the record, the offer letter dated 14th January 2004 is signed by one Vaishali for A.S.Nagpal and others on the letter

head of Sudarshan Constructions. It is stated that the said offer letter was given to Pradeep Wadhwa to be delivered to the Commissioner. No authority was given to Pradeep Wadhwa to bid either before the Commissioner or the Court and the offer given in writing for Rs.4.11 crores was final offer. This position is, however, not supported by the offer letter. The offer letter reads thus :

"Date : 14th Jan 2004.

To,
The Commissioner for Taking Accounts,
High Court,
Mumbai

Sir,

Re : In the high Court of Judicature at Mumbai
Execution Application No.77 of 2002
Camoren Finance & Investments
V/s.
M/s.Viral Enterprise & Ors.

We have taken inspection of the immovable property known as 'Chakala Property' situate at Kajuwadi, Sahar Road Behind Gold Spot Factory, Chakala, Andheri (E), Mumbai:- 400 099. We are giving our offer of Rs.4,11,000/- (Rupees Four Lakhs Eleven Thousand only) to purchase the abovementioned property.

We are enclosing herewith a Demand Draft of Rs.10,00,000/- (Rupees Ten Lakhs only) in your favour bearing Demand Draft of Rs.10,00,000 Dt.15th Jan 2004. Drawn on

Bank of Baroda towards initial deposit.

We are requesting you to accept the same.

Yours Faithfully,

Sd/-
For A.S.Nagpal & Others

Encl:Sealed envelope."

25. It is stated that Sudarshan Constructions was unaware that Pradeep Wadhwa had given offer before the Commissioner for Taking Accounts as well as this Court on their behalf. On the other hand, on repeated enquiries being made, Mr.Pradeep Wadhwa told them that Court orders are still awaited. It is the case of Sudarshan Constructions that around 23rd February 2004 for the first time, they were informed by Commissioner for Taking Accounts about the developments that had taken place including calling upon them to pay sum of Rs.2.01 crores. On receipt of this communication, immediately Sudarshan Constructions wrote back to the Commissioner denying their liability. The reply sent on behalf of Sudarshan Constructions is already reproduced earlier. It is then stated that Pradeep Wadhwa is neither a partner nor an employee

or authorised representative of Sudarshan Constructions. No Vakalatnama was signed on behalf of Sudarshan Constructions by any of the partners of the firm. It is also stated that they were not aware of any order preceding sale or for that matter the terms and conditions of sale, for no information was given by Pradeep Wadhwa even after confirmation of sale in their favour or later. But that came to the notice only after receipt of communication from the Commissioner. It is then stated that Commissioner ought to have verified the credentials of Pradeep Wadhwa before allowing him to participate in the bid on behalf of Sudarshan Constructions. Having failed to do so, it is material irregularity and therefore, offer made by Pradeep Wadhwa will not bind them. As mentioned earlier, Harmohan Singh Nagpal filed further affidavit on 5th July 2005 with a view to ratify the stand taken by Amrik Singh Nagpal in the affidavit-in-support of the Chamber Summons. In this affidavit, Harmohan Singh, partner of Sudarshan Constructions has stated that Pradeep Wadhwa contacted him on 14/15th January 2004. He, in turn, requested Amrik Singh by giving authority

to submit offer on behalf of Sudarshan Constructions. As mentioned earlier, the authority letter which was produced for the first time, across the bar in Court, is dated 2nd January 2004, which clearly means that decision was already taken on behalf of Sudarshan Constructions to purchase the property and services of Pradeep Wadhwa were used on or after 14th January 2004. In this affidavit, Harmohan Singh Nagpal has then attempted to explain away the discrepancy in the affidavit of Amrik Singh which states that Amrik Singh has signed the letter of offer. Now in this affidavit, Harmohan Singh states that Amrik Singh instructed Vaishali to sign on his behalf. The offer letter was dictated by Amrik Singh on phone to Vaishali. This affidavit also concedes the position that Bank Draft in the sum of Rs.10,00,000/- (Rupees Ten Lakhs) was prepared from the account of other sister concern, of which, Amrik Singh was the director. In this affidavit, it is stated that no Vakalatnama was signed by him. Amrik Singh has filed further affidavit in this Court making allegations against the Commissioner and reiterating the offer of Rs.4.11 cores for vacant

and peaceful possession of the subject property. He further states that the sale ought to have been confirmed in favour of M/s.M.B.Developers instead of M/s.Zoom Developers Pvt.Ltd., as M/s.M.B.Developers had made offer for Rs.5.48 crores and no reason is forthcoming as to why M.B.Developers was allowed to walk out of the offer. The substance of the case made out on behalf of Sudarshan Construction is that Pradeep Wadhwa was not a partner nor employee nor representative of Sudarshan Constructions. No authority was given in his favour to offer bid either before the Commissioner or the Court. No Vakalatnama has been signed by any partner of the firm and no Vakalatnama is on record either before the Commissioner or the Court. The Commissioner has failed to verify the credentials of Pradeep Wadhwa, which was material irregularity and offer made by Pradeep Wadhwa cannot bind Sudarshan Constructions. According to them, the case on hand even if not a case of fraud, is one of material irregularity, for which reason, Sudarshan Constructions cannot be made liable to pay the deficiency of price.

26. On the other hand, Pradeep Wadhwa has filed affidavit in this Court asserting that he was instructed for and on behalf of Sudarshan Constructions to not only deliver the offer letter but also to raise the bid before the Commissioner as well as the Court. Acting on the said instructions, he participated in the bidding process and made offer on behalf of Sudarshan Constructions. According to Pradeep Wadhwa the stand taken on behalf of Sudarshan Constructions is contradictory and inconsistent and the version of Harmohan Singh Nagpal as well as Amrik Singh Nagpal cannot be believed and relied upon. According to Pradeep Wadhwa, offer made by him was not for his benefit, but was only to benefit Sudarshan Constructions, as they would stand to gain by purchasing the property.

27. This is the nature of evidence which has come on record from the affidavits filed by the respective parties. The question is: whether the stand taken on behalf of Sudarshan Constructions can be accepted or whether the affidavits of

Harmohan Singh Nagpal and Amrik Singh Nagpal will have to be discarded, being unreliable version. In my opinion, from the circumstances, which I will presently indicate, I have no hesitation in taking the view that the stand now taken before this Court is only to create a facade so as to get absolved from the liability of deficiency price. The circumstances from the material on record clearly point out that Sudarshan Constructions participated in the sale of subject property and had taken informed decision in that behalf. From the affidavit filed on behalf of Sudarshan Constructions, it is obvious that Pradeep Wadhwa got in touch with Harmohan Singh Nagpal on telephone on 14th January 2004, when Harmohan Singh Nagpal was out of Mumbai. On Pradeep Wadhwa contacting Harmohan Singh Nagpal, he in turn, informed Amrik Singh Nagpal, who is his brother, authorising him to submit bid on behalf of Sudarshan Construction in the office of the Commissioner for Taking Accounts. However, from the material produced by Sudarshan Constructions it transpires that authority in favour of Amrik Singh Nagpal was already given on 2nd January 2004,

assuming that the authorisation letter/certificate produced across the bar was to be accepted as it is. The plea of Amrik Singh Nagpal in the affidavit, however, is that he himself signed the offer letter dated 14th January 2004, when in fact, the said offer letter is given on the letter head of Sudarshan Constructions signed by one Vaishali for and on behalf of A.S.Nagpal and others. The events explained on behalf of Sudarshan Constructions to authorise Pradeep Wadhwa are not consistent. The fact remains that Pradeep Wadhwa was handed over offer letter dated 14th January 2004 to be given in the Office of Commissioner for Taking Accounts. It is true that the said letter does not mention that Pradeep Wadhwa was authorised to offer increased bid on behalf of Sudarshan Constructions. However, according to Pradeep Wadhwa, he was told to bid on behalf of Sudarshan Constructions and for which reason, he made the offer before the Commissioner as well as before the Court. There is no satisfactory explanation forthcoming as to why Sudarshan Constructions remained silent from 15th January 2004 till 23rd February 2004 inspite of having delivered bank

draft of Rs.10,00,000/- (Rupees Ten Lakhs) to be submitted in the Office of the Commissioner along with the offer letter. The only explanation given is that enquiries were made with Pradeep Wadhwa when they were told that final orders were still awaited. It is inconceivable that a party who had taken a conscious decision to participate in the sale, much before Pradeep Wadhwa was introduced on the scene and had parted with sum of Rupees Ten Lakhs, would not move in the matter even when the terms and conditions as published clearly mentioned that the parties should remain present in the office of the Commissioner on 15th January 2004 "and can raise their offer", if they so desire. The explanation offered on behalf of Sudarshan Constructions is, therefore, unacceptable and does not seem to be natural.

28. As mentioned earlier, there are contradictions and inconsistencies on matters which are relevant to throw light on the authority of Pradeep Wadhwa. The stand taken on behalf of Sudarshan Constructions will have to be discarded, being unreliable and untrustworthy. There is no

reason why Pradeep Wadhwa would have made higher offer on behalf of Sudarshan Constructions. Pradeep Wadhwa was not to benefit as the sale was to be confirmed in favour of Sudarshan Constructions. The sale had in fact been confirmed in favour of Sudarshan Constructions. It is obvious that it is only when Sudarshan Constructions were unable to pay the amount, the dispute has been raised about the authority of Pradeep Wadhwa for the first time, in the letter of 23rd February 2004. The said letter was, however, not annexed to the Chamber Summons, though a crucial document to support the stand of Sudarshan Constructions. From the record produced by the Commissioner, it is seen that report dated 15th January 2004 of the Commissioner was served on Sudarshan Constructions under Certificate of Posting on 17th January 2004 on their admitted address. The report does disclose the developments which had taken place. There is no reason to doubt that the said report was not received by Sudarshan Constructions assuming that Pradeep Wadhwa did not communicate the developments that took place on 15th January 2004 to any partner of Sudarshan

Constructions.

29. Viewed in this perspective, it is not possible to accept the stand that they were not aware about the developments till around 23rd February 2004. On the other hand, it can be inferred from the circumstances that Sudarshan Constructions was aware about the developments from time to time but preferred to keep silent over the matter till 23rd February 2004. Only after having realised that they were not in a position to comply with the obligations under the terms and conditions of sale, on 23rd February 2004 dispute was raised before the Commissioner about the authority of Pradeep Wadhwa. Pradeep Wadhwa had no personal benefit in increasing the offer. Accordingly, the claim of Sudarshan Constructions that no authority was given to Pradeep Wadhwa cannot be accepted. It is also not possible to countenance that Pradeep Wadhwa was not authorised to raise the offer before the Commissioner on 15th January 2004. If it is so, it is not a case of no authority or any act of commission or omission by Pradeep Wadhwa in excess

of authority. There was authority given to Pradeep Wadhwa as can be discerned from the circumstances on record to raise the bid which he did before the Commissioner on 15th January 2004. It is only to resile from the said offer, now dispute about the authority of Pradeep Wadhwa has been raised. Indeed, there is nothing on record to show that Pradeep Wadhwa was partner of Sudarshan Constructions. It is also true that Pradeep Wadhwa represented himself to be partner of Sudarshan Constructions before the Commissioner on 15th January 2004 as well as before this Court on 20th January 2004. However, that will not affect the offer made on behalf of Sudarshan Constructions, which was on account of authority given to Pradeep Wadhwa, in handing over the letter of offer and to remain present on 15th January 2004 before the Commissioner for raising offer, if required. As mentioned earlier, the offer letter nowhere specifies that the offer of Rs.4.11 cores is final offer or that Sudarshan Constructions were not interested in increasing the offer at all. The Commissioner cannot be blamed for the statement made by Pradeep Wadhwa that he was partner of the

firm. That, however, does not undermine the offer made by Pradeep Wadhwa for and on behalf of Sudarshan Constructions for which there was tacit authority given to him to tender the offer letter and also remain present to raise the offer.

30. Viewed in this perspective, it is not possible to countenance the stand of Sudarshan Constructions that offer made by Pradeep Wadhwa was without authority or that it was in excess of authority. If we were to hold to the contrary, that would result in granting premium to the party, who has come to the Court with a false plea questioning the authority given for participating in the Court auction taking recourse to technical grounds. In my opinion, the circumstances clearly establish that Pradeep Wadhwa had authority not only to submit the offer letter but also remain present before the Commissioner as well as the Court for raising the offer. The Commissioner has communicated the developments of 15th January 2004 immediately on 17th January 2004. There is no reason to assume that such communication has not been received or was not known to Sudarshan

Constructions, as it was sent on their admitted address. Accordingly, it will have to be held that Pradeep Wadhwa had authority and the offer made by him for and on behalf of Sudarshan Constructions was not in excess of authority.

31. It was argued on behalf of Sudarshan Constructions that the Court was proceeding on conjectures and surmises, if it were to reach at the abovesaid conclusion. This submission clearly overlooks that affidavit is also in the nature of evidence adduced before the Court by the parties. The relevant circumstances can be culled out from the said affidavits. The conclusion which are drawn by me are on the basis of the said evidence, having found that the version given in the affidavits filed on behalf of Sudarshan Constructions was untrustworthy. If it is so, it was open to this Court to record opinion on the basis of such legal inference, which can be drawn from the pleadings on record. Viewed in this perspective, it is not a case of findings recorded on the basis of conjectures but on the basis of legal inference that can be drawn from the evidence

available on the record. Counsel for the Sudarshan Constructions pressed into service Sections 227, 228 and 235 of the Contract Act. In my opinion, those provisions will be of no avail to the fact situation of the present case. Section 227 provides for how far the principal is bound, when the agent exceeds authority. I have already rejected the claim of Sudarshan Constructions that Pradeep Wadhwa has exceeded authority as such. In that view of the matter, Section 227 will be of no avail. Section 228 provides that where an agent does more than what he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction. For the reasons already mentioned, even this provision will be of no avail to the Sudarshan Constructions. Insofar as Section 235 is concerned, it postulates the liability of pretended agent. In the present case, I have already found that Pradeep Wadhwa had authority to participate in proceedings before the Commissioner. It is not a case of pretended agent as such. At best, the pretension was with regard to disclosing himself as

partner of the firm. However, I have already found that there was authority in favour of Pradeep Wadhwa to participate in proceedings before the Commissioner. Such a case will not come within the meaning of pretended agent. Section 235 will be applicable in a case where such person was not given any authority at all and falsely and untruly claimed himself to be the authorised agent of another.

32. On the above finding, I have no hesitation in taking the view that the Commissioner will have to proceed against Sudarshan Constructions in accordance with law, for which reason, reliefs claimed in the Commissioner's Reports will have to be granted while rejecting the claim of Sudarshan Constructions. Ordered accordingly.

33. That takes me to the controversy which arises for consideration on account of the stand taken in the praecipe moved at the instance of Advocate Mr.Deepak Singh. It is his case that he had no knowledge about any order passed on 28th January 2004. He has not entered appearance nor

filed any Vakalatnama in the proceedings. On the other hand, Mr.Vijay Pandey who appeared before the Court states that he had appeared as Counsel i/b Mr.Deepak Sigh, Advocate. His affidavit discloses that he had directed Pradeep Wadhwa through Mr.Deepak Singh to file Vakalatnama and was appearing as Counsel. He was informed by Deepak Singh as well as Pradeep Wadhwa that the Vakalatnama has been filed. From the pleadings filed by the Advocates and Mr.Pradeep Wadhwa, and considering the evidence that has unfolded, at least one thing is certain that one of the Advocate is taking a false position. Either Mr.Deepak Singh is falsely denying that Pradeep Wadhwa had met him and that he had never told Mr.Vijay Pandey that he has already filed Vakalatnama, or Mr.Vijay Pandey is deposing false on affidavit. This is a serious matter. It is possible that this controversy has been raised with purpose, so as to eventually benefit Sudarshan Constructions. Instead of entering into this controversy, in my opinion, it is appropriate that the said aspect be referred to Bar Council for a proper enquiry and appropriate decision as may be advised. I am adopting this

course because appearance of Mr.Deepak Singh on 28th January 2004 as recorded, will hardly make any difference to the main issue which has been decided under this order of fastening liability regarding deficiency of price on Sudarshan Constructions. This is so, because the liability arose on account of report of the Commissioner dated 15th January 2004 and confirmation of sale in favour of Sudarshan Constructions by Court on 20th January 2004. The controversy regarding appearance of Mr.Deepak Singh is of a latter date namely 28th January 2004. That will have no bearing on the final decision that has to be reached with regard to the issue of liability of Sudarshan Constructions.

34. In the circumstances, it is not necessary for me to burden this Judgment with the controversy about appearance of Mr.Deepak Singh recorded in proceedings dated 28th January 2004. Those aspects will have to be therefore considered by the Bar Council of Maharashtra and appropriate decision taken in the matter.

35. Accordingly, I proceed to pass the following order:

(1) Chamber Summons No.859 of 2004 filed on behalf of Sudarshan Constructions is dismissed with costs.

(2) The Commissioner’s report dated 12th August 2004 is made absolute in terms of prayer clauses (a), (b) and (c).

(3) Praecipe dated 20th September 2004 is disposed of with direction to the Office to send one set of proceedings along with the copy of this Judgment to the Bar Council of Maharashtra for taking appropriate action, as may be advised against the concerned Advocates.

36. At this stage, Counsel appearing for Mr.Deepak Singh and Sudarshan Constructions pray that operation of this order be stayed to enable the respective parties to take up the matter in appeal, if so advised.

37. This order not to be acted upon for a period of ten weeks from today.

A.M.KHANWILKAR, J.